Buana Perdana Sdn Bhd v Chan Siew Cheong & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–2165 OF 2008
MARY LIM J
19 AUGUST 2011

Partnership — Liabilities of partners — Retirement of partner — Whether partner discharged from liability — Whether s 19(3) of the Partnership Act 1961 complied with — Whether settlement of plaintiff's judgment debt by third party discharged partner of liability

The plaintiff was a housing developer. The first and second defendants were partners of the third defendant firm of advocates and solicitors ('the firm'). In connection with housing development, the plaintiff had deposited stakeholder sums ('monies') with the firm, which monies were due for release to plaintiff on 23 August 2008. However when the due date arrived and the firm issued its cheque for the monies to the plaintiff, the cheque bounced. So did two more cheques issued as replacement. It was then discovered that an accounts clerk of the firm had misappropriated the monies. When it failed to receive the monies, the plaintiff filed the instant action. Summary judgment was entered against the firm, the action against the first defendant was set down for trial and the claim against the second defendant was withdrawn. Although the first defendant claimed he was not liable as he had retired from the firm on 31 December 2007, ie before the date the monies were due for release to the plaintiff, the court found him liable as he was a partner both when the monies were deposited with the firm as well as when they were misappropriated. Two out of the three cheques that the firm had issued to the plaintiff for payment of the monies also bore the first defendant's signature and the cheques were dated on September 2008. The court concluded from this that he must have signed the cheques as a partner of the firm. The outcome of the case, however, took a turn during the trial when witnesses for the plaintiff volunteered evidence of settlement of the plaintiff's debt. It transpired that after summary judgment was entered against the firm, the wife of the firm's founding partner ('PW1') had settled the plaintiff's claim with a director of the plaintiff personally on condition (i) the plaintiff pursued with its recovery action against all those who were partners of the firm when the monies were deposited with it (which included the first defendant); and (ii) the firm be allowed to pursue its claim against the insurers. The plaintiff's director who had received the settlement amount loaned that sum to the plaintiff which did not execute its judgment against the firm.

Held, dismissing the claim against the first defendant with no order as to costs:

(1) Regardless of what motivated PW1 to see to the payment or for his wife

to pay the judgment sum, payment in respect of the summary judgment against the firm was in fact made. The plaintiff's claim must therefore be deemed satisfied (see paras 57-58).

(2) In accepting that settlement, the plaintiff must be regarded as having discharged the first defendant from liability to pay (see para 60).

(3) This was an eventuality within the course of the proceedings which the court could not disregard in the interests of justice. The court could not turn a blind eye to the events and simply ignore the events for what they truly represented. To do so might inadvertently aid in injustice and a double recovery for the plaintiff which the court could not condone or be party to (see para 61).

(4) On the totality of the evidence, the plaintiff had not proved its claim against the first defendant on a balance of probabilities (see para 63).

[Bahasa Malaysia summary

Plaintif merupakan pemaju perumahan. Defendan pertama dan kedua adalah rakan-rakan kongsi sebuah firma peguambela dan peguamcara ('firma') defendan ketiga. Berkenaan dengan pembangunan perumahan, plaintif telah mendepositkan jumlah wang ('wang') pemegang amanah kepada firma, di mana wang sepatutnya dikeluarkan kepada plaintif pada 23 Ogos 2008. Walau bagaimanapun apabila tarikh akhir tiba dan firma mengeluarkan cek bagi wang kepada plaintif, cek tersebut ditendang. Dua lagi cek dikeluarkan sebagai pengganti juga turut ditendang. Kemudian, didapati bahawa seorang kerani akaun firma telah menyalahgunakan wang. Apabila gagal menerima wang, plaintif telah memfailkan tindakan ini. Penghakiman ringkas telah dibuat terhadap firma tersebut, tindakan terhadap defendan pertama telah ditetapkan untuk perbicaraan dan tuntutan terhadap defendan kedua telah ditarik balik. Walaupun defendan pertama mendakwa dia tidak bertanggungan kerana dia sudah bersara daripada firma tersebut pada 31 Disember 2007, iaitu sebelum tarikh wang sepatutnya dikeluarkan kepada plaintif, mahkamah mendapatinya bertanggungan kerana dia adalah rakan kongsi kedua-dua apabila wang didepositkan kepada firma serta ketika ia telah disalahgunakan. Dua daripada tiga cek-cek yang telah dikeluarkan oleh firma kepada plaintif bagi pembayaran wang juga mempunyai tandatangan defendan pertama dan cek-cek adalah bertarikh September 2008. Mahkamah membuat kesimpulan daripada ini bahawa dia telah menandatangani cek sebagai rakan kongsi firma tersebut. Keputusan kes tersebut, walau bagaimanapun, berubah semasa perbicaraan apabila saksi-saksi plaintif secara sukarela memberi keterangan penyelesaian hutang plaintif. Selepas penghakiman ringkas dimasukkan terhadap firma tersebut, isteri rakan kongsi pengasas firma ('PW1') telah menyelesaikan tuntutan plaintif dengan pengarah plaintif, secara peribadi, dengan syarat (i) plaintif meneruskan dengan tindakan mendapatkan balik terhadap kesemua mereka yang menjadi rakan-rakan kongsi firma tersebut ketika wang

A didepositkan ke dalamnya (yang mana termasuklah defendan pertama); dan (ii) firma dibenarkan untuk meneruskan tuntutannya terhadap insurans. Pengarah plaintif yang telah menerima jumlah penyelesaian memberi pinjam jumlah wang tersebut kepada plaintif yang tidak melaksanakan penghakiman terhadap firma itu.

B

Diputuskan, menolak tuntutan terhadap defendan pertama tanpa perintah terhadap kos:

(1) Walau apa pun yang memotivasikan PW1 untuk membuat pembayaran atau bagi isterinya untuk membayar jumlah penghakiman, bayaran berkenaan dengan penghakiman ringkas terhadap firma tersebut adalah pada hakikatnya telah dibuat. Oleh itu, tuntutan plaintif hendaklah disifatkan sebagai telah dipenuhi (lihat perenggan 57–58).

C

(2) Dalam menerima penyelesaian tersebut, plaintif hendaklah dianggap sebagai telah melepaskan defendan pertama daripada liabiliti untuk membayar (lihat perenggan 60).

D

(3) Ini adalah satu kemungkinan dalam perjalanan prosiding yang mana tidak boleh diabaikan oleh mahkamah demi kepentingan keadilan. Mahkamah tidak boleh menutup mata kepada peristiwa-peristiwa dan hanya mengabaikan peristiwa-peristiwa atas perwakilan sebenar mereka. Untuk berbuat demikian secara tidak sengaja mungkin membantu dalam ketidakadilan dan mendapatkan kembali dua kali bagi plaintif yang mana mahkamah tidak boleh biarkan atau menjadi pihak kepadanya (lihat perenggan 61).

E

F

(4) Pada keseluruhan keterangan, plaintif tidak berjaya membuktikan tuntutan terhadap defendan pertama di atas imbangan kebarangkalian (lihat perenggan 63).]

G **Notes**

For cases on retirement of partner, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1053–1056.

Cases referred to

H *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623; [1996] 2 CLJ 455, HC (refd)

Chinn Swee Onn v Puchong Realty Sdn Bhd [1990] 1 MLJ 108; [1990] 1 CLJ (Rep) 44, SC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 2 CLJ

I 871, SC (refd)

Eng Leong Material Supplies Sdn Bhd v Ho Lee Ing [2009] MLJU 248; [2009] 1 LNS 267, HC (refd)

Guthrie Property Development Holding Bhd v Baharuddin Hj Ali & Ors [2011] 3 MLJ 416; [2010] 6 CLJ 218, HC (refd)

Hj Nik Ishak bin Hj Nik Daud v Nik Zainab bt Nik Jaafar [1975] 2 MLJ 82, FC (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)
Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710; [2006] 1 CLJ 1, CA (refd)
Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd [2005] 7 MLJ 216, HC (refd)
Malayan Banking Bhd v Rozlan bin Abd Rahman [1996] MLJU 554; [1996] 1 LNS 313, HC (refd)
OCBC Ltd v Philip Wee Kee Puan [1984] 2 MLJ 1; [1984] 1 CLJ (Rep) 25, PC (refd)
Pinson v Lloyds and National Provincial Foreign Bank Limited [1941] 2 KB 72, 75, CA (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin [1994] 3 MLJ 185, SC (refd)
Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825, FC (refd)
Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250; [1993] 3 CLJ 188, HC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 (Act 118)
Housing Development (Control and Licensing) Regulations 1989 reg 11(1), Schedule G, Third schedule Item 5
Legal Profession Act 1976 s 78
Partnership Act 1961 ss 11, 19, 19(2), (3)
Solicitors Acounts (Deposit Interest) Rules 1990 r 2(1)(a)

R Thilakan (Thilakan & Co) for the plaintiff.
SC Tan (Cheah Teh & Su) for the first defendant.

Mary Lim J:

PREFACE

[1] The events that led to this suit could be said to be a lawyer's worse nightmare that brings 'embarrassment of the highest order' to not just the firm but also to the partners of the firm — the misappropriation of funds belonging to clients from the firm's accounts supposedly by the firm's accounts clerk. By the time the misappropriation is discovered, the culprit is generally long gone leaving red faced partners scrambling to work out some measure of damage control. Apart from the criminal aspects of the debacle, there will be the insurance and clients claims to sort out and of paramount importance, the accountability of the partners under the Legal Profession Act 1976 (Act 166). It is unfortunate that such events continue to occur despite the presence of

stringent measures and numerous regulations. To some extent, this is because the whole fabric of the contractual relationship is one steeped in trust, including trusting those engaged to assist in the management of a legal firm. These are the salient facts in this case.

THE SALIENT FACTS

[2] The plaintiff is a housing developer while the third defendant is a firm of advocates and solicitors. The first defendant and second defendants were some time partners of the third defendant.

[3] At the end of 2006, the plaintiff deposited a total sum of RM582,355.50 belonging to a few purchasers of housing units developed by the plaintiff. These monies were said to have been deposited with the third defendant as stakeholder. When those monies were due for release on 23 August 2008, the third defendant issued the plaintiff with a Public Bank Bhd Cheque No 171141 for a sum of RM620,103.79 comprising the earlier sum deposited together with interest. Unfortunately, that cheque was dishonoured. The third defendant then issued CIMB Cheque No 534554 dated 3 September 2008 for the same amount to replace the earlier cheque. That cheque, too, was dishonoured. And so, the third defendant issued a second CIMB Cheque No 534555 dated 4 September 2008. This third cheque too, was dishonoured.

[4] Mr Chong Keng Keong ('PW2'), the plaintiff's director then received a call from Dato Vijay Kumar Natarajan ('PW1'), founding partner of the third defendant. PW1 had retired from the partnership on 31 December 2006 but had continued to act as a consultant since 1 January 2007. PW1 informed PW2 that 'he had just returned from Australia and had discovered that the third defendant's accounts clerk, Ms Sanesh had withdrawn the plaintiff's monies without authorisation and the firm only discovered the misappropriation when its cheques bounced'.

[5] On 29 September 2008, the plaintiff caused its solicitors to issue a notice of demand requiring from the defendants the payment of their 'stakeholder's funds of RM620,103.79 to be paid at the latest by 5.00pm Friday 3 October 2008. When no payment was forthcoming, the plaintiff sued.

THE CLAIM AND THE DEFENCE

[6] The plaintiff sued the firm as the third defendant. It also sued the first and second defendants as partners of the third defendant at the material time. These defendants are sued jointly and severally for the non-payment of the sum of RM620,103.79 together with interest.

[7] The first defendant disputed the claim contending that the claim was not maintainable against him as the incidents or matters complained of occurred well after his retirement from the partnership of the third defendant. The first defendant retired from the third defendant on 31 December 2007. Specifically, it was pleaded at para 6 of the defence that the cause of action related to the failure to release the stakeholders' money when such monies were due, that is on 23 August 2008. By or on that date, the first defendant had already retired from the third defendant and was therefore not liable.

ISSUE

[8] On 15 September 2009, summary judgment was entered against the third defendant but a trial was ordered in respect of the claim against the first defendant. In relation to the first defendant, the court held that the issue of whether the first defendant who had left the partnership on 31 December 2007 was still liable was a triable issue. The claim against the second defendant has since been withdrawn. Therefore, the sole issue for determination is:

Whether the first defendant is liable to the plaintiff for the sum of RM620,103.79 when he has left the partnership of the third defendant on 31 December 2007.

DETERMINATION

Housing Development (Control and Licensing) Act 1966 (Act 118)

[9] The first defendant raised some fairly extensive arguments on a preliminary issue concerning the pleadings and the identity of the exact cause of action initiated by the plaintiff against him. This is a summary of his principal arguments articulated by his learned counsel, Mr SC Tan.

[10] Learned counsel first identified what he considers is the plaintiff's pleaded case against the first defendant. He contended that the pleaded case was based on a debt incurred as a result of the third defendant's cheques being dishonoured. According to him, this is obviously not a claim founded in contract or negligence. This cause of action accrued on 23 August 2008 when the third defendant failed to pay the plaintiff its monies due on that date of maturity. In support of his contention, he relied on the affidavits filed by the plaintiff in support of its application for summary judgment against him.

[11] The first defendant further contended that the plea of the receipt of monies by the third defendant in its capacity as stakeholder is bare of the terms and conditions of the alleged stakeholding, including that the monies came under the purview of the Housing Development (Control and Licensing) Act

1966 (Act 118). The plaintiff was said to have then attempted to repair its case in the course of trial through the testimonies of its witnesses.

[12] The point made by the first defendant is that the pleas for a claim related to the holding of the monies as stakeholder must be detailed or particularised. For instance, the matter of the placement of the stakeholder sum in a fixed deposit bearing interest; that the holding was in respect of 5% of the balance purchase price for the project known as Phase 2A Taman Buana Perdana; that the stakeholder sum was to be released in two defined or identified stages; that the stakeholder sum was subject to claims by the purchasers under the respective sale and purchase agreements; all these material facts must be specifically pleaded. Relying on *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250; [1993] 3 CLJ 188; *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623; [1996] 2 CLJ 455 and *Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd* [2005] 7 MLJ 216; the first defendant urged the court to therefore disregard all evidence led in support of any 'unpleaded matter'.

[13] The plaintiff succinct response was to invite the court to ignore this issue as it was not pleaded.

[14] On my part, whilst the first defendant arguments are attractive and certainly correct as far as procedural law is concerned, I must reject them for several reasons. But, first of all, this is what happened.

[15] In the course of trial and submissions, Mr R Thilakan, learned counsel for the plaintiff had led evidence and had submitted that the claim is in respect of monies deposited and held pursuant to reg 11 of the Housing Development (Control and Licensing) Regulations 1989. Subregulation 11(1) provides:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land 6 appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[16] Learned counsel for the plaintiff pointed out that in this case, the relevant form is that prescribed in Schedule G. Now, cl 4 of that standard form sale and purchase agreement provides for the schedule of payments. Payments are by installments according to the progress of development:

> (4) The purchase price shall be paid by the Purchaser to the Vendor by installments and at the time and in the manner as prescribed in the Third Schedule hereto …

[17] In the Third Schedule, one can see a table setting out the various milestones for payments. The relevant time-line for the purposes of this case is that found at item 5 which makes reference to monies held by the 'vendor', in this case the plaintiff solicitors, as stakeholder. The third defendant is that solicitor. Item 5 reads:

5. On the date the Purchaser takes vacant possession of the said Building as in item 3 and to be held by the Vendor's solicitor as stakeholder for payment to the Vendor as follows:	5 RM
(a) two point five per centum (2.5%) at the expiry of six (6) months after the date the Purchaser takes vacant possession of the said Building;	2.5 RM
(b) two point five per centum (2.5%) at the expiry of eighteen (18) months after the date the Purchaser takes vacant possession of the said Building	2.5 RM

[18] It is all this evidence in relation to Act 118 and the regulations made thereunder that the first defendant has asked this court to ignore. As I had said earlier, I must decline these contentions.

[19] In the first place, I find that the fundamental rule of pleading is not breached here. I say so because from the statement of claim, it is clear that the plaintiff claim is for recovery of its money deposited with the third defendant. Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* applied the oft-reminded rule that 'All facts that are essential to constitute a cause of action must be alleged'. Therefore, what must be pleaded will be the material facts which are 'necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad'. This is said to be 'the plainest and most fundamental of all the rules of pleading' — per Scott LJ in *Pinson v Lloyds and National Provincial Foreign Bank Limited* [1941] 2 KB 72, at p 75.

[20] The first defendant had further contended that even if the pleadings are right, the evidence led must also accord with that pleaded case. That in fact, goes without saying. Otherwise, as Hj Abdul Malik bin Hj Ishak J (as he then was) reminded in *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* at p 460 that where a witness's narration deviates from the pleaded case, that account 'must surely be suspect'.

[21] For the purposes of the plaintiff's claim against the first defendant, these are the critical pleas. As against the first defendant, the plaintiff pleads that he

is liable because he was a partner of the third defendant:

(a) at all material time — para 2 of the statement of claim;

(b) at the time when the sum of RM582,355.50 was deposited with the third defendant — para 3 of the statement of claim; and

(c) at the time when that sum was removed from the third defendant without authorisation, that is in February 2007 — paras 3, 7 and 8 of the statement of claim.

[22] The plaintiff's cause of action became complete when on 23 August 2008, the maturity date or the date when the sum of RM582,355.50 deposited with the third defendant was to be released to the plaintiff with interest, the plaintiff did not receive that sum. Put in another way, it was only on this date that the monies became due and payable and the third defendant was obliged to return the monies held to the plaintiff. This is when the cause of action is complete, when all the material facts needed to prove a claim are in place for a claim to be launched as decided by the Federal Court in *Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825 citing its own earlier decision in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871. When the third defendant failed to pay on that due date, that was when the breach occurred and the cause of action arose — see *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710; [2006] 1 CLJ 1.

[23] The plaintiff's did not receive its payment because the cheques including the two replacement cheques that bore the first defendant's signature were all dishonoured. It is at this point that there is loss or damage to the plaintiff. From the pleas identified, it can be readily concluded that on 23 August 2008, 'All facts that are essential to constitute a cause of action' and which are 'necessary for the purpose of fonvulating a complete cause of action' exist. These essential or material facts have indeed been pleaded.

[24] Secondly, there are references to the receipt of the monies in question as stakeholders in the statement of claim. In my opinion, these references allow for such evidence to be adduced. At para 1, the plaintiff is identified as a property developer. At paras 2 and 3, there are pleas to the effect that the plaintiff had paid monies to the defendants as stakeholder. These pleas as well as the first defendant's responses to them are significant factors that distinguish the first defendant's case from the decisions that he had cited and relied on. One of those decisions being the Privy Council's decision in *OCBC Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1; [1984] 1 CLJ (Rep) 25.

[25] In that case before the Privy Council, the material facts are these. In the course of the trial, a letter of acknowledgment was put in evidence by the

appellant. The appellant had not pleaded any acknowledgment of debt either in the statement of claim or in the reply. The trial court gave judgment for the appellant. This was reversed on appeal by the Federal Court which found that the letter constituted a new cause of action which must be pleaded. Since it had not been pleaded, the claim was disallowed and the respondent was given judgment.

[26] The Privy Council disagreed with the Federal Court. It held that an acknowledgment of a statute-barred debt did not give rise to a new claim or a new cause of action as the acknowledgment 'constitutes the accrual of the right of action to recover the debt' as it 'continues' or 'renews' or 'establishes' the original promise'. In coming to its decision, the Privy Council referred to another Federal Court decision of *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 which had shared similar views. But, for the purposes of our present case, it is useful to note that the Privy Council pointed out the consideration of Raja Azlan Shah CJ (as His Highness then was) that where limitation was to be relied on, an acknowledgment should be pleaded. Nevertheless, the Privy Council added that His Highness had rightly added the following:

> Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we thing there are materials on the record from which a decision to that effect could be arrived at, as one of the objects of modem pleadings is to prevent surprise we cannot for one moment think that the defendant was taken by surprise.

[27] These observations of the Privy Council are also material and of application in the facts of this case. In another decision of the Supreme Court in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin* [1994] 3 MLJ 185, at p 189, it was once again expressed that the 'underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from the pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party'.

[28] Here, contrary to his objections, and as borne out by the statement of claim and more importantly, by the first defendant's defence, there is no basis for the first defendant's concerns. At para 6, the first defendant readily pleaded that he was not liable because the plaintiff's cause of action only arose on 23 August 2008, when the monies were due to be repaid or on the date of maturity. The first defendant pleaded that he was not liable for the third defendant's failure to pay because he had retired from the third defendant by that date. The first defendant's unequivocal usage of the phrase 'maturity' (*matang*) is indicative of his appreciation of the arguments under Act 118.

[29] The testimonies and the plaintiff's submissions of the operations under Act 118 and the regulations made under that Act do not in any way handicap, prejudice, embarrass, mislead or, even take him by surprise. In fact, it may be said that he responded and was more than adequately prepared for the trial of the cause against him.

[30] Further, it must be reminded that the plaintiff's claim is not that there has been mismanagement of its monies by the third defendant. The plaintiff's claim is not founded on a breach of the third defendant's duties and liabilities as stakeholder generally or that there was a failure to handle the monies paid in a particular manner. It cannot be denied that there may be the occasion; in fact, it frequently is the case that a claim is made for the failure of the stakeholder to observe its general duties and obligations as stakeholder. For instance, the failure to put the monies held in a separate account; for failing to ensure that due care and attention was exercised in the care and custody of the monies held.

[31] The fact of how the monies came to be in the possession of the third defendant is also not in dispute. Additionally, the fact of non-release of the monies on the date when due is also not disputed by the first defendant, or by anybody. The first defendant is not for a moment, asserting that the monies in question were not the plaintiff or that the monies need not be returned to the plaintiff. What the first defendant disputes is his liability towards that lack of payment or failure to pay.

[32] I am therefore not persuaded by the first defendant's arguments in this regard.

Partnership Act 1961 (Act 135)

[33] Having put the claim and the defence in its proper context, it is now easier to move forward to address the issue posed under the Partnership Act 1961 (Act 135). The first defendant says he cannot be liable because on 23 August 2008, he had long retired. By that date, he was no longer a partner with the third defendant having retired on 31 December 2007. This fact of retirement is also acknowledged by the plaintiff at para 8 of the statement of claim. Yet, it does not appear to make any difference to the plaintiff as the claim is nevertheless pursued.

[34] So, the real question is whether on 23 August 2008, when the monies were due to be released, the first defendant was still a partner with the third defendant. To this specific allegation, the first defendant is not denying that the monies received are the plaintiff's. However, he launches two responses here. First, whilst he was a partner when the monies were received by the third defendant, the plaintiff was not his client but some other partner's. He

therefore cannot be liable. Second, though he was a partner when the monies were received, he was no longer partner when those monies were due for release as he had already retired from the third defendant. He had given notification of his retirement to the plaintiff's staff and therefore was discharged from liability.

[35] In my judgment, neither argument is tenable. But, I must first express my observation on the matter of discharge under sub-ss 19(2) and (3) of the Partnership Act 1961 (Act 135). This is a material plea which under the rules of procedure must be pleaded. Otherwise, such matters cannot be raised and if raised, must be disregarded. There are no pleas of this nature in the defence filed. These matters rightly cannot be considered. Be that as it may, these are my views on the matter.

[36] Taking the first argument. What the first defendant sought to do was really to disassociate himself with the work in his firm that was related to receiving such monies from clients who had purchased real estate or from developers of such estate. Specifically, he was distancing himself from the conveyancing arm at the third defendant. Legal firms, like all properly managed offices, organise their office according to various portfolios handled. This in turn is dependent on the kind of expertise and thereby services that the legal firm wants to offer its clientele. Often, one sees firms sectionalised into the different specialised areas of practice such as litigation and dispute resolution; corporate, finance, banking, mergers and acquisitions; intellectual property; and, real estate or conveyancing.

[37] To me, these arrangements of office management and organisation are highly laudable in keeping with good and sound corporate practice. But, these arrangements are immaterial to the question of accountability and legal liability to clients. The administrative division of work and business within any legal firm does not and cannot alter the vital attributes of the institution of a partnership. The partnership remains an association of individuals who, by reason of their art and skills necessarily offer that expertise personally instead of through the establishment of a corporate sole. And, that is how a legal practice is operated in this country, just as much as anywhere else in the world. Insofar as the client is concerned, his dealings are with the firm and not a particular partner. He may, however, request for the services of a particular partner or counsel due to some peculiar reason or purpose and be charged the fees appropriate to that partner or counsel. But that does not alter the primary principles of partnership. The settlement of any dues by a client is always to the firm and not to any individual partner. That is also why the Legal Profession Act 1976 (Act 166) mandates the cover of insurance to protect clients, the firm and the practice.

[38] In this case, I understand there are pending arbitration proceedings

against the insurance company for recovery of the monies taken by the elusive Miss Sanesh by the third defendant. The insurance company has repudiated liability under the insurance policy. But, that is a different story and does not affect the current proceedings.

[39] Returning to the evidence under Act 118, there was also some explanation as to when the monies were received and where the monies were deposited in the third defendant's accounts. The first defendant challenged the credibility of this evidence. In summary, the first defendant's challenge was that the total amount of monies received did not match the amounts deposited, and the dates of the deposits were all wrong. The net effect being the evidence led did not support the plaintiff's claim.

[40] Having scrutinised the evidence, I do not agree with the first defendant. What is important is to remind oneself that the third defendant, and for that matter, everyone at the firm including the first defendant, are governed by the Solicitors' Accounts (Deposit Interest) Rules 1990 made pursuant to s 78 of the Legal Profession Act 1976 (Act 166). Rule 2(1)(a) of those rules mandates that monies held or received by the solicitors must be deposited in fixed deposits. And, that was where the monies in question were held.

[41] Coming back to the issue here, I am not satisfied that the first defendant's actions were sufficient to discharge him from liability as partner of the third defendant. The answer to the poser lies in the provisions of the Partnership Act 1961 (Act 135). Section 11 of the Act 135 provides that every partner is liable for all debts and obligations of the partnership which were incurred while the partner was a partner. Section 11 reads:

> Every partner In a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

[42] Section 19 of the Act 135 concerns the liability of incoming and outgoing partners. Specifically, sub-ss 19(2) and (3) provide:

> (2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.
>
> (3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

[43] From the clear provisions of sub-s 19(2), although the first defendant may have retired as partner of the third defendant, he 'does not thereby cease to be liable for partnership debts or obligations incurred before his retirement'. In fact, as seen from the clear words used in s 11, even the death of the partner does not discharge that deceased partner for 'all debts and obligations of the firm incurred while he is a partner'. The estate is 'also severally liable in a due course of administration for such debts and obligations'. This is consonant with the principle tenets of the law of partnership; that one deals with the person and not an artificially created corporate sole.

[44] These provisions show that the debts and obligations incurred during his tenure as partner will remain with him even after his retirement. Bearing in mind my findings that the division of work in the third defendant makes not an iota of difference to the first defendant's obligations, this means that the first defendant will remain obligated for the monies received by the third defendant. This obligation includes the obligation for the release of those monies. This interpretation is consistent with those reached in *Malayan Banking Bhd v Rozlan bin Abd Rahman* [1996] MLJU 554; [1996] 1 LNS 313 and *Guthrie Property Development Holding Bhd v Baharuddin Hj Ali & Ors* [2011] 3 MLJ 416; [2010] 6 CLJ 218.

[45] However, by virtue of s 19(2) and (3) read together with the earlier s 11, the first defendant may be discharged from those existing liabilities if the conditions in s 19(3) are fulfilled. Otherwise, he remains liable. For there to be a valid discharge, s 19(3) requires the presence of an agreement of the first defendant's discharge between the first defendant and the members of the third defendant as 'newly constituted' and the creditors, in this instance, the plaintiff. This agreement of discharge may be expressed or inferred as a fact from the 'course of dealing between' the plaintiff and the newly constituted third defendant.

[46] Here, there is no evidence of any express agreement nor was there even a suggestion of the same by the first defendant who testified on his own behalf. As for inference, there is insufficient evidence led for the court to draw that necessary inference. The first defendant testified that he had informed one Sharon Tan, the marketing manager of the plaintiff that he was leaving the third defendant. This happened when Sharon Tan inquired about the presence of the second defendant. I am skeptical of this piece of evidence as it is not consistent with the rest of the first defendant's testimony that the plaintiff was not his client; and that he only notified those clients whose files he was taking with him when he left the third defendant.

[47] What is overlooked is that it is not enough to merely inform the client of one's leaving the partnership. Even if the first defendant had informed

Sharon Tan that he was leaving the third defendant, that still would not have been enough to discharge him. Sub-s 19(3) requires the first defendant to procure the agreement of the plaintiff that he would be discharged from existing liabilities with his retirement from the firm. There is no such evidence here and on this point alone, the cover of sub-ss 19(2) and (3) are not available to the first defendant.

[48] Further, a close reading of sub-s 19(3) requires the agreement of discharge not only between the first defendant and the creditors like the plaintiff. It also requires agreement of the 'members of the firm as newly constituted'. The first defendant attempted to show the presence of the new members' agreement by inference from 'the course of dealing between the creditors and the firm as newly constituted'. He claimed that the computation of the dates for release of the monies under Housing Development (Control and Licensing) Regulations 1989 showed that those monies ought to have been released earlier than they were finally released. So when the third defendant released those monies albeit the related cheques were subsequently dishonoured, there was clearly a course of dealing which recognised the newly constituted third defendant as the new debtor. This change in arrangement made after the retirement of the first defendant was said to have thereby discharged the first defendant under sub-s 19(3) of Act 135.

[49] In this respect, the actions of the first defendant in signing the relevant cheques require very close examination. Of the three cheques in question, two of them bear the first defendant's signature. Those cheques being CIMB Bank Cheque No 534554 and CIMB Bank Cheque No 534554. All three cheques including PBB Cheque No 171141 were dated 26 August 2008, 3 September 2008 and 10 September 2008 respectively and all of them were for the same sum of RM620,103.79. All three cheques were dishonoured upon presentation.

[50] The first defendant testified that he was a signatory to the third defendant's Public Bank account but he was removed in 2008. There is no indication whether that coincided with the date of the first cheque. However, the first defendant signed the two replacement cheques. Relying on *Eng Leong Material Supplies Sdn Bhd v Ho Lee Ing* [2009] MLJU 248; [2009] 1 LNS 267, the first defendant has suggested that nothing can be made from that fact.

[51] Again, with respect, I must disagree. The signatory of any cheque, especially of non-personal chequing accounts holds out that the signatory has the necessary and appropriate authorisation and mandate to sign for the holder of the account. That signatory holds out and implies that the cheque will be honoured when presented for payment. In other words, that there are sufficient monies in the relevant account for honouring the cheque. Those are

minimums of what a signatory represents and holds out to the bearer of the cheque. Therefore, the choice of any signatory to cheques is a careful and certainly deliberate one. That choice is dictated necessarily by factors such as positions of seniority, management and control within any establishment. Legal partnerships are no exception. In fact, in view of the Legal Profession Act 1976 (Act 166), it can be safely said that checks and balances are in place to ensure that signing of cheques are serious business and properly adhered to or complied. The fact that the first defendant was a signatory to start with shows how careful the choice was; that only partners signed.

[52] Hence, the first defendant's explanation that there was nothing to be attached to such signing cannot be accepted. At the time of the signing, the first cheque had already been dishonoured. If the first defendant had indeed properly retired from the third defendant and was discharged from liabilities, there would have been no reason for him to sign not just one but two cheques, long after his retirement almost eight months earlier. How that could still have been possible is somewhat disquieting. It should not happen but it did.

[53] The first defendant is a legally qualified person, a senior practitioner fully aware of his duties, responsibilities and obligations. Yet, he signed cheques although he was no longer partner in the third defendant. In such circumstances, it can reasonably be concluded that the first defendant signed the replacement cheques for no other reason but because he was still a partner with the third defendant. Of critical importance, this was acknowledged by the first defendant himself. Since the first defendant was a partner who did not consider himself discharged from his liabilities at the material time of the cause of action, the action is clearly sustainable against him.

[54] Before leaving this area, a final look at the pleadings in relation to Act 135 reveals another interesting but certainly pertinent factor. In my earlier observations on the basis of the plaintiff's claims against the first defendant, I said that the plaintiff had pleaded that the first defendant was liable because he was a partner of the third defendant at two critical points in time: (1) when the money was deposited; and (2) when the money was removed. At both material moments, it cannot be denied that the first defendant was indeed a partner at the third defendant firm. On that score alone, the first defendant is liable for the non-payment and non-return of the plaintiff's monies.

[55] But, all that does not settle matters. There is this troubling point of full payment by PW1's wife. He explained that the current partners of the third defendant felt 'strongly that they had no obligation to pay the plaintiff as they were not partners when the funds were deposited or misappropriated. They are innocent parties. However, in order to preserve my good name and the name of the firm, my wife has taken steps to deposit as security the amount of

RM620,103.79 on condition that the plaintiff pursue with recovery from all the other partners at the time when the monies were deposited as well to allot the third defendant firm to pursue its claim against the insurer'.

[56] PW2 confirmed this payment. But, this was his understanding of what the payment was. He testified that he received payment 'right after judgment, Dato paid me'. He then went on to explain that the payment was by PWTs wife and it was made after summary judgment had been entered against the third defendant. PW2 further testified that the payment was on condition that the deposit was to him personally and he then loaned it to the plaintiff. This then allowed the third defendant to pursue its claim with the insurers and the plaintiff, its action against the first defendant.

[57] I appreciate the fact that PW1 may not have personally made any payment towards the judgment sum. In my view however, regardless of what motivated PW1 to see to the payment or for his wife to make payment of the judgment sum, payment in respect of the summary judgment procured against the third defendant was in fact made. Any settlement of any judgment sum is not dependent on who actually makes the payment. PW2 had also agreed in cross-examination that because of the settlement arrangement, the plaintiff did not execute the summary judgment that it had procured against the third defendant.

[58] PW2 also informed the court that he had loaned the amount to the plaintiff. Why and how that was actuated was not explained. I can only understand this to be in reference to the judgment sum. So, as far as the plaintiff is concerned, that sum which was outstanding in its books is resolved. There may be what learned counsel for the plaintiff referred to as a 'hole' in the third defendant's client's account. But, that is immaterial and irrelevant. This is not a claim by the third defendant in respect of that 'hole'. This is a claim for recovery of monies by the plaintiff. Since that deficiency has been met, regardless of how and by whom, the sum paid accords with the sum claimed and the judgment ordered. The plaintiff's claim must therefore be deemed satisfied.

[59] In addition, I cannot find any other reason for the payment to PW2. PW2 himself has no reason to be paid by PW1 or his wife, nor is he alleging that there is. The payment can only be said to be on behalf of the third defendant. PW1 had informed the court that he was concerned with the 'good name of the third defendant'. The settlement must therefore be for or on behalf of the third defendant.

[60] There is high authority on this principle in the Supreme Court decision in *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108; [1990] 1 CLJ

(Rep) 44 which referred to its earlier decision in *Hj Nik Ishak bin Hj Nik Daud v Nik Zainab bt Nik Jaafar* [1975] 2 MLJ 82. In accepting that settlement, the plaintiff must be regarded as having discharged the first defendant from liability to pay.

[61] I recognise that this matter was not pleaded. But, there is a material difference here in that this was an eventuality within the course of the proceedings itself which the court cannot disregard in the interests of justice. The court cannot turn a blind eye to the events and simply ignore the events for what they truly represent. To do so may inadvertently aid in injustice and a double recovery for the plaintiff which the court simply cannot condone nor be a party to.

[62] What I further believe is of paramount importance is the fact that this evidence of accord and satisfaction was actually volunteered by the plaintiff through both its witnesses. Such evidence that the plaintiff itself adduced was not objected to and are now relied on by the first defendant. I cannot see how the plaintiff can properly protest or even suggest that such evidence is of either no or limited value or relevance.

[63] Therefore, on a totality of evidence, I am not satisfied that the plaintiff has proved its claim against the first defendant on a balance of probabilities. The claim of the plaintiff against the first defendant is therefore dismissed with no order as to costs, as proposed by the parties.

Claim against first defendant dismissed with no order as to costs.

Reported by Ashok Kumar